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No. 90-977

IN THE

Supreme Court of the United States

October Term, 1990

RPM MANAGEMENT COMPANY, INC. AND
RECTOR-PHILLIPS-MORSE, INC. ..... *Petitioners*

VS.

ROBERT CHOWNING; JUDITH D. BURROW, EXECUTRIX
OF THE ESTATE OF LAWRENCE B. BURROW, DECEASED;
WILBUR P. GULLEY, JR.; MARY E. GULLEY;
JANET GULLEY WADE; HERSCHEL FRIDAY,
AND HAWTHORNE LAND COMPANY ..... *Respondents*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF ARKANSAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court review, on Petition for Writ of Certiorari, an ordinary contract dispute involving state law questions, based on allegations unsupported in the record, that the Arkansas Court's decision not to publish its opinion in this case, which overturned "years of established legal precedent," somehow violated the Petitioners' Fourteenth Amendment rights?

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STATEMENT OF THE CASE

On January 6, 1973, Rector-Phillips-Morse, Inc. ("RPM") purchased the Southwest City Mall (the "Property") in Little Rock, Arkansas, for the purpose of reselling it to prospective real estate investors. Several days later, on January 11, 1972, RPM entered into a 25-year property management agreement (the "Agreement") with its wholly owned subsidiary, Anything, Inc., predecessor to RPM Management Company, Inc. ("Management"). The Agreement was unrecorded.

Over nine months after the execution of the Agreement, RPM conveyed interests in the Property to Larry Burrow ("Burrow") and Robert Chowning ("Chowning") by Warranty Deeds dated September 26, 1972. The three thereafter formed a Joint Venture to own and operate the Property. The Agreement was never assigned to the Joint Venture and the Joint Venture never undertook the responsibility of being obligated thereunder. Subsequently, RPM divested itself of its remaining interests in the Property either through transfers within the Joint Venture or by conveying undivided interests in the Property through Warranty Deeds. The Respondents (and the Rector family, which was not a party to the litigation) ultimately owned 100% of the Property.

None of the Respondents were told of the existence of the Agreement at the time they purchased their respective interests in the Property. Some of the owners learned of the existence of the Agreement subse-

quent to the acquisition of their interests. Some owners never learned of the existence of the Agreement until shortly before this litigation was commenced.

Mr. Rector, the then-president of RPM, represented to the Respondents who acquired their interests while he was still living, that his company would stay in the project with them and that, when the tax benefits of ownership expired, they would all sell the Property. At the trial level, the Chancery Court of Pulaski County, Arkansas (the "trial court") found that Mr. Rector had affirmatively represented to the Respondents that the Property would be sold free and clear of any continuing property management obligation to Management. Respondents, Herschel Friday and Joel Ledbetter, of Hawthorne Land Company, testified that they never intended to ratify or assume the Agreement for a term extending beyond any sale of the property; rather, they intended that Management would continue to manage the property for only so long as they owned it.

In 1983, the Respondents decided to list the Property for sale and retained RPM as the sales co-broker. At that time, RPM still held a ten-percent (10%) ownership interest in the Property. At no time during the discussions dealing with the decision to sell the Property did RPM or Management advise the other owners that they considered the Agreement to be binding through January 5, 1997. Rather, in late 1984, when the first offer to purchase the Property was received, RPM and Management, for the first time, asserted that Management

had the right to continue to manage the Property beyond a sale until 1997.

Between 1984 and 1986, Respondents received three separate offers to purchase the Property, each of which, according to Chowning, was conditioned upon the termination of Management's services. On December 31, 1986, Respondents conveyed their interests in the Property and, as a result of the sale, RPM collected a real estate commission of $53,600.00. Management's services were terminated effective December 31, 1986. The Property's prospective purchaser had been advised of Management's claims under the Agreement and refused to consummate the transaction unless Petitioners released their claims relating to the Property. Accordingly, so that the sale would not be lost, the Respondents were forced to enter into an Escrow Agreement with the Petitioners, pursuant to which a letter of credit was obtained by the Respondents from which the Petitioners' claims, if ultimately proved valid, could be paid. As a result of the filing of the Petition with this Court, the Respondents continue to incur bank fees in order to maintain the letter of credit in force.

The trial court found in favor of the Petitioners against three of the Respondents and awarded damages in the sum of $41,651.31. The remaining owners were absolved of any liability under the Agreement. The Petitioners appealed. On cross-appeal, the Respondents contended in the Arkansas Court of Appeals (the "Arkansas Court") that none of the owners were bound by

the Agreement and the Arkansas Court agreed, reversing the trial court's decision to the extent that it awarded any damages to the Petitioners.

At no time during the proceedings, either before the trial court, or on appeal before the appellate court's decision was announced, did the Petitioners raise the due process and equal protection arguments which they now assert before this Court in support of their Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The Petitioners assert that, merely because the Arkansas Court chose not to publish its opinion in this case, their equal protection and due process rights guaranteed by the Fourteenth Amendment to the Constitution of the United States have been violated. It is alleged that the Arkansas Court departed from "long established" legal principles in order to arrive at a decision which was binding only upon the litigants involved in this case but which is not binding on the other citizens of the State of Arkansas.

In the first instance, no appellate decision, whether published or not, is "binding" on anyone other than the parties to the litigation. True, the decision, if published, could have precedential value under the doctrine of *stare decisis*. However, the mere fact that the opinion in this case was not published does not amount to a denial of equal protection and due process. The Arkansas Court's decision would have been the same, published or not.

While the Petitioners assert that the decision of the Arkansas Court "overturns 200 years of precedent" and establishes the "irrebuttable mum deadman rule," it should be rather obvious from even a cursory reading of the trial court's opinion and of the decision of the Arkansas Court on appeal that we are here dealing with a plain vanilla contract case to which the Arkansas Court applied no extraordinarily new legal principles.

In this case, the Petitioners sought to impose upon the Respondents a 25-year real estate management contract to which none of the Respondents were parties, to which none of them agreed, which none of them signed, of which none of them had any knowledge when they purchased their respective interests in the Property, which came into existence solely as a result of RPM's self-dealing with its wholly owned subsidiary, which had never been enforced according to its terms by the original parties thereto and which contained no provision relating to its continuation in the event of a sale of the Property to which it was allegedly applicable.

The event of a future sale of the Property was an extremely important factor in the decision of all of the Respondents to purchase their respective interests therein. The then-president of RPM, Billy Rector, affirmatively represented to prospective purchasers that the Property would be sold when the tax advantages of ownership ceased to exist. If the Agreement was ever binding upon the Respondents in the first instance (which is denied), and if RPM intended to assert the enforceability of the Agreement subsequent to a sale of the Property by all owners, then, as the trial court found, a material misrepresentation had been made by Mr. Rector, which constituted fraud in the inducement.

In any event, it is too late to raise as issues the equal protection and due process arguments for the first time **after** the appeal process has run its course. Constitutional arguments are not considered on appeal if not

properly submitted to the trial court for a ruling. *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1947); *Prater v. St. Paul Insurance Company*, 293 Ark. 547, 739 S.W.2d 676 (1987); and *Morris v. Garmon*, 285 Ark. 259, 686 S.W.2d 396 (1985).

The Respondents assert that they could not have raised the equal protection and due process arguments until after they were denied those rights and privileges by the decision of the Arkansas Court not to publish its opinion. The Petitioners seem to imply that the Arkansas Court, in deciding not to publish its opinion in this case, was somehow attempting to carve out a special body of law which would only be applicable to the "prominent" attorneys, property owners and financial institution executives (so dubbed by the Petitioners in their Petition herein) who are the Respondents. Surely this Court does not believe that the Arkansas Court is so corrupt as to fashion a "private" decision for the Respondents.

In this case, full and complete hearings were held at all stages of the litigation. The Petitioners were represented by counsel at every step of the way who presented their position with great vigor. The simple truth is that the Petitioners lost their case on the merits pursuant to well established legal principles. The filing of this Petition for a Writ of Certiorari in this Court, in view of the record involved in this case, is spurious on its face and constitutes a waste of the time and resources of this Court, of counsel and of the litigants.

A deprivation of the right to equal protection and due process simply does not exist under the facts in this case. This Court dealt with a similar situation in *Park Avenue Investment & Development, Inc., et al. v. Donald L. Barkheimer, II, et al.*, 471 U.S. 1108, 85 L.Ed.2d 859, 105 S.Ct. 2171 (1985). There, in a separate concurring opinion, Chief Justice Burger stated that the filing of a Petition for Writ of Certiorari in the case, in an attempt to invoke the Court's jurisdiction, was utterly frivolous and apparently done for the sole purpose of delaying the collection of a debt. Justice Burger opined that Rule 49.2 sanctions should have been imposed upon the attorney for the petitioners.

In *Park Avenue Investment, supra,* the petitioners sought certiorari based upon an argument that their equal protection rights had been violated by the state court's failure to apply a Florida statute. As here, the petitioners' equal protection "argument" was raised for the first time after the appeal. In dealing with the lateness issue, Justice Burger stated:

> In reviewing judgments of state courts, of course, we do not consider constitutional arguments that were not properly presented in the state courts.

As in *Park Avenue Investment & Development, supra,* the Petitioners here assert that their rights to due process and equal protection have been violated by the Arkansas Court's refusal to follow Arkansas law regarding the parol evidence rule and the law dealing with

the construction of contracts. As *Park Avenue* establishes, there simply is no basis for the assertion, under the facts in this case, that the Petitioners have been deprived of their Fourteenth Amendment rights. Moreover, the argument that the Arkansas Court departed from well established legal principles in rendering its decision is wholly inaccurate. For example, the parol evidence rule has many exceptions, not the least of which is that, if an oral material misrepresentation of fact is made in the inducement, evidence of the oral misrepresentation is readily admissible to correct a situation which otherwise would amount to simple fraud. According to the Petitioners, the Arkansas Court should have excluded from evidence the oral representations of Billy Rector which were made to the Respondents when they acquired their respective interests in the Property. The Petitioners' argument is totally lacking in merit. When promissory representations are made fraudulently for the purpose of inducing another party to enter into a contract, such representations may be proved by parol evidence as a defense to an action on the contract. *Starling v. Valmac Industries, Inc.*, 589 F.2d 382, 386 (8th Cir. 1979); and *Farmers Coop Association v. Garrison*, 248 Ark. 948, 454 S.W.2d 644, 648-649 (1976).

Moreover, the parol evidence rule has no application when the very question at issue is whether the parties entered into a contract of any kind. It must be remembered that none of the Respondents were parties to the Agreement. Likewise, where there is a question of whether the parties intended to integrate their entire Agreement into the document involved in the case, the

parol evidence rule is not applicable. Also, the parol evidence rule does not apply to contracts which have not been fully executed and finally consummated. *Marshall Motor Service v. Norm Co.*, 194 Ark. 805, 109 S.W.2d 662, 665 (1937). Additionally, when an ambiguity exists (i.e., the effect of the Property's sale upon the Agreement), particularly in view of the representations found to have been made by Mr. Rector, parol evidence is obviously admissible to determine the true intent of the parties. *Peevy v. Bell*, 255 Ark. 663, 501 S.W.2d 767 (1973).

In this case, the trial court found, as matters of fact, that:

1. The Management Agreement's duration was a self-serving and back door attempt to lock in Management's services, which was totally unrelated to the risks and needs of the business;

2. The Management Agreement was not disclosed to the Respondents when they bought their interests and none of them thereafter assented to its application beyond a sale of the property;

3. When Respondents purchased their respective interests, they and RPM intended to retain ownership for only ten (10) years due to the tax consequences;

4. The Management Agreement was an undisclosed risk with severe detrimen-

tal effects;

5. RPM breached fiduciary duties owed to the Respondents; and

6. RPM had engaged in overreaching, inequitable, unconscionable and self-serving conduct.

All of the fact findings made by the trial court are supported by the record and were affirmed on appeal by the Arkansas Court. None of the fact findings was clearly erroneous. Since the trial court found that a material misrepresentation was made to the Respondents, the Arkansas Court correctly absolved all of them from any liability under the Management Agreement.

The trial court found culpable conduct on the part of the Petitioners, consisting of lack of disclosure while standing in a fiduciary relationship, self-dealing, unfair surprise, unconscionable conduct, undue overreaching and attempts to "have it both ways." The factual findings made by the Arkansas trial court and affirmed by the appellate court were tantamount to a determination of active fraud on the part of the Petitioners in their dealings with the Respondents.

In actuality, if the opinions of the trial court and of the Arkansas Court are carefully reviewed, it becomes evident that standard legal rules relating to contracts, evidentiary matters and fraud and misrepresenta-

tion were applied by the Arkansas Courts in determining that the Petitioners were entitled to no relief. No exception to Arkansas' contract law was carved out for the sole benefit of the Respondents, as is intimated by the Petitioners in this case.

The trial court found, as a matter of fact, that the Joint Venture (to which some of the Respondents were parties) had never assumed any of the obligations of the Agreement. Likewise, the trial court found that there was never any intent (or assent) by any of the Respondents to assume any obligation under the Agreement which would have continued beyond a sale of the Property. In point of fact, any understanding between the parties was found to have been to the contrary.

Moreover, as the Arkansas Court pointed out, the "Chancellor found that relief from the contract was warranted because of the misrepresentations of Billy Rector." In other words, the trial court found the existence of fraud and deception in the inducement, which finding was affirmed on appeal. Suffice it to say, the common law of Arkansas has long provided for relief from agreements which are induced by deception and misrepresentation. The Arkansas Court did not need to fashion new legal remedies in order to reach a just result in this case.

The Petitioners complain of the Arkansas Court's alleged creation of what they call the "irrebuttable mum dead man rule." Apparently, the source of the

Petitioners' irritation lies in the fact that, according to them, the Arkansas Court based its decision upon what Billy Rector "did not say." A close examination of the two Arkansas Courts' opinions clearly reveals otherwise. In the first instance, the decision in this case was not based upon what a dead man "did not say" but rather upon specific fraudulent misrepresentations which were made by Mr. Rector. For example, the trial court found that the existence of the Agreement and its terms were not disclosed to any of the Respondents at the time their respective interests were acquired. The trial court also found no evidence of any intent to assent to the Agreement's extending beyond the sale of the Property. To the contrary (as opposed to what Billy Rector did not say), the trial court found that specific representations were made by him to the effect that the sale of the Property was contemplated in ten years because of the existing tax laws. Also, according to the Arkansas Court on appeal, "Billy Rector had represented that the Management Contract would terminate on the sale of the Property." Therefore, we are not dealing with "what a dead man did not say"; we are dealing with specific representations which were made by Mr. Rector and which were relied upon by a number of the Respondents in acquiring their respective interests in the Property involved.

Interestingly enough, some of the Respondents, such as Mr. Rector's widow, did not acquire their respective interests in the Property until after his death. The current officers of the Petitioners, who testified at trial, did not offer any testimony which would have

rebutted the prior representations made by Mr. Rector. Accordingly, even if the Petitioners' position otherwise has merit, there was ample opportunity for rebuttal of the Respondents' evidence by the Petitioners' officers.

The Petitioners also assert that their rights to due process were violated when the Arkansas Court ignored Arkansas statutes and case law in reaching its decision in this case. The Arkansas statutes upon which the Petitioners base their argument are simply not applicable. Ark. Code Ann. §4-42-309 does not apply because the trial court found, as a matter of fact, that the Agreement was never assigned to or assumed by the Joint Venture and therefore never became a partnership liability. This fact is conveniently overlooked by the Petitioners.

Likewise, Ark. Code Ann. §4-42-304 is not applicable to this litigation because the trial court found, as a matter of fact that none of the Respondents, when they acquired their respective interests, had any knowledge whatsoever of the existence of the Agreement, which had been entered into between RPM and its wholly owned subsidiary and which had not been placed of record.

The Petitioners next assert that Arkansas law was ignored by the Arkansas Court because the Agreement expressly stated its duration and was "binding upon successors and assigns." However, the Petitioners overlook the fact that the Agreement was never assigned to the Respondents and was never executed by them. The

mere purchase by the Respondents of an interest in real property owned by RPM did not constitute an assignment by RPM of its rights and responsibilities under the Agreement.

Contrary to the assertion of the Petitioners, the reasoning of the Arkansas Court in this case would not invalidate every contract made in the State of Arkansas which specifically expresses a period of time during which it will be in effect. The Arkansas Court's decision only invalidates those agreements which have been fraudulently foisted upon others and which are conceived in deception and misrepresentation continued over a period of years. It takes much gall to argue a denial of due process and equal protection when one has been found to have been guilty of deception, misrepresentation, unconscionable conduct, breach of fiduciary duty, overreaching and the like.

The Petitioners also argue that mere "knowledge" of the existence of the Agreement somehow has the effect of legally binding a non-party thereto. This is not the law in Arkansas or anywhere else. The Arkansas statutes relied upon by the Petitioners simply do not support their position. A contractual obligation cannot be created from the mere fact that a person has knowledge of the existence of the agreement in question.

It is not clear what relief the Petitioners seek. They complain mightily of the decision of the Arkansas Court not to publish its opinion in this case. Are

they asking this Court to direct the Arkansas Court to publish its decision? If so, how would such a ruling change the outcome of this litigation? As the Respondents understand the Petitioners' argument, if the Arkansas Court had simply elected to publish its decision, all vestiges of the alleged deprivation of due process and equal protection would have disappeared. In short, it seems to be the position of the Petitioners that the "failure" to publish the decision carved out a "private ruling" for the Respondents which does not apply to other citizens of the State of Arkansas. In point of fact, the publication of the Arkansas Court's decision would change nothing.

In the words of Chief Justice Burger, in his concurring opinion in *Park Avenue Investment & Development, supra:*

> This petition is an attempt to invoke the Court's jurisdiction on an utterly frivolous claim, and on this record I believe that the purpose of the Petition is to delay collection of a debt. This use of the Court's processes should subject the attorney who filed this Petition to the sanction of Rule 49.2 of this Court.

The position taken by the Petitioners in this matter is totally without merit, at best, and completely specious, at worst. The Petition for a Writ of Certiorari in this Court should be summarily denied.

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CERTIFICATE OF SERVICE

I, Michael G. Thompson, hereby certify that a copy of the foregoing Response to Petition for Writ of Certiorari has been forwarded by United States Mail, postage paid, to Mr. W. W. Elrod, II, Gill and Elrod, 1600 Stephens Building, Little Rock, Arkansas 72201 on this 11th day of January, 1991.

MICHAEL G. THOMPSON